Affin Bank Bhd v Wan Abdul Rahman bin Wan Ibrahim

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–300 OF 2001

ABDUL HAMID MOHAMAD, RICHARD MALANJUM AND ARIFIN ZAKARIA JJCA

13 JANUARY 2003

Civil Procedure *— Execution — Leave to issue execution more than six years after judgment — Application made before expiry of 12-year limitation period prescribed by Limitation Act 1953 — Neglect of former solicitors to initiate necessary action advanced as reason in support of application — Applicant also to blame for inaction — Whether sufficient reasons shown for court to exercise discretion in favor of applicant*

Civil Procedure *— Judgments and orders — Application to enforce order made more than six years after order — Whether sufficient reasons advanced for court to exercise discretion to allow application*

The appellant had applied to the High Court for leave to enforce an order of court. The application had been made more than six years after the date of the order but within the 12-year limitation period under s 6(3) of the Limitation Act 1953. In its affidavit in support, the appellant alleged the neglect of its former solicitors to initiate the necessary action. The High Court dismissed the application on, inter alia, the ground that the appellant had failed to sufficiently explain its failure to enforce the order within six years. The appellant thus appealed to the Court of Appeal.

Held, dismissing the appeal:

(1) It is incumbent upon an applicant to furnish the court with sufficient reason in support of an application under O 46 r 2(1) of the Rules of the High Court 1980 ('the RHC'). Sufficient reason varies from case to case and it is not possible for the Court of Appeal to provide an exhaustive list of what is considered to be sufficient reason. In the instant case, the fact that the application was made within the 12-year period as prescribed by s 6(3) of the Limitation Act 1953 was not a sufficient ground for the granting of leave as the right to sue on a judgment is distinct from the right to issue execution (see p 512B–E).

(2) Although the only reason advanced by the appellant in support of its application was the neglect of its former solicitors, the appellant was not free from blame, having taken more than two years to appoint new solicitors after failing to hear from its former solicitors. The Court of Appeal would agree with the High Court that the appellant had failed to furnish sufficient reason to persuade the court to exercise the discretion in its favor (see p 512G–I).

[Bahasa Malaysia summary

Perayu telah memohon kepada Mahkamah Tinggi untuk kebenaran menguatkuasakan satu perintah mahkamah. Permohonan tersebut telah dibuat lebih daripada enam tahun daripada tarikh perintah tersebut tetapi dalam tempoh had masa 12 tahun di bawah s 6(3) Akta Had Masa 1953. Dalam affidavit sokongannya, perayu mengatakan bekas peguamcaranya telah cuai untuk memulakan tindakan yang perlu. Mahkamah Tinggi telah menolak permohonan tersebut atas, antara lain, alasan bahawa perayu telah gagal untuk menjelaskan kegagalannya untuk menguatkuasakan perintah tersebut dalam tempoh enam tahun. Perayu oleh itu telah merayu ke Mahkamah Rayuan.

Diputuskan, menolak rayuan tersebut:

(1) Ia adalah wajib untuk pemohon mengemukakan kepada mahkamah sebab yang mencukupi bagi menyokong satu permohonan di bawah A 46 k 2(1) KMT. Sebab yang mencukupi berbeza dari satu kes ke satu kes dan ia tidak mungkin untuk Mahkamah Rayuan mengemukakan satu senarai lengkap tentang apa yang dianggap sebagai sebab yang mencukupi. Dalam kes semasa, hakikat bahawa permohonan tersebut telah dibuat dalam tempoh 12 tahun sebagaimana yang ditetapkan oleh s 6(3) Akta Had Masa 1953 bukan satu sebab yang mencukupi untuk memberikan kebenaran kerana hak untuk menyaman atas suatu penghakiman adalah berbeza daripada hak untuk mengeluarkan pelaksanaan (lihat ms 512B–E).

(2) Walaupun satu-satunya sebab yang dikemukakan oleh perayu bagi menyokong permohonannya adalah kecuaian bekas peguamcaranya, perayu tidak dikecualikan daripada kesalahannya, kerana mengambil lebih daripada dua tahun untuk melantik peguamcara baru selepas tidak mendengar apa-apa berita daripada bekas peguamcaranya. Mahkamah Rayuan bersetuju dengan Mahkamah Tinggi bahawa perayu telah gagal untuk mengemukakan sebab yang mencukupi untuk meyakinkan mahkamah menggunakan budi bicara yang menyebelahinya (lihat ms 512G–I).]

Notes

For cases on leave to issue execution more than six years after judgment, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2325–2328.

Cases referred to

Public Bank Bhd v Seato Trading(M) Sdn Bhd & Ors [1996] 1 MLJ 165 (refd)

A *Tio Chee Hing v Chung Khiaw Bank Ltd* [1981] 1 MLJ 227 (refd)

Legislation referred to

Limitation Act 1953 s 6(3)
Rules of the High Court 1980 O 46 r 2(1)(a)

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Appeal from: Suit No 2(S7)–24–633 of 1987 (High Court, Kuala Lumpur)

Karen Wilfred (*Rashid & Lee*) for the appellant.

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Arifin Zakaria JCA (delivering judgment of the court): This is an appeal against decision of the learned judge in refusing the appellant's (plaintiff) application for an order that the appellant be allowed to commence execution proceedings against the respondent (defendant) pursuant to an order of court dated 21 January 1988 although six years had lapsed since the
D making of the order. The application was pursuant to O 46 r 2(1)(a) of the Rules of the High Court 1980.

When this appeal came up for hearing the respondent was absent but we proceeded to hear the appeal in the absence of the respondent. Having heard submission of counsel for the appellant, we dismissed the appeal.
E Now we give our reasons for our decision.

The relevant facts as disclosed by the affidavit filed in support of the appellant's application are briefly as follows. The appellant had on 21 January 1988 obtained a judgment in default of appearance against the respondent wherein the respondent was, inter alia, ordered to pay the sum of RM47,579.96 together with interest at the rate of 10%pa from 13 July
F 1986 to the date of full and final realization. Thereafter, a bankruptcy notice was filed on 27 August 1993 against the respondent by the former solicitors for the appellant, which was served on the respondent by substituted service. The appellant's solicitors then filed an application to amend the bankruptcy notice and the application for leave to file the creditor's petition.
G Following which the creditor's petition together with the affidavit of truth of statement were filed. The creditor's petition was fixed for hearing on 24 July 1996. On that date, the then counsel for the appellant was absent and the court then struck off the creditor's petition. Some time in 1998, the appellant retained the present solicitors and this application was filed on 27 August 1999 by the present solicitors.

H The learned judge in dismissing the appellant's application gave the following reasons:

> Whilst the plaintiff has indeed filed an application for leave within the 12-year expiry period as provided under section 6(3) of the Limitation Act 1953, and read together with O 46 r 2(1)(a) of the RHC, yet the leave asked for can only
I be given based on reasonably acceptable grounds. In this case, the plaintiff has totally failed to explain why it did not execute within the six years provided under O 45 r 2(1)(a), other than implying that its previous solicitors had failed to act. The negligence, if any, of the plaintiff's solicitors is no reason why the

> defendant ought to suffer, by paying excessive interests for all these years. Yet again the plaintiff has failed to give any reason as to why it failed to act immediately after the expiry of the first six years and up to the date of filing this application. To my mind the plaintiff ought to have given very cogent and acceptable reasons to enable this court to exercise its discretion in its favor to grant the leave.

It is trite that the grant of leave under O 46 r (2) is in the court's discretion. Order 46 r 3 states that an application under O 46 r 2(1) must be supported by an affidavit stating, when the case falls within r 2(1)(a), the reasons for the delay in enforcing the judgment or order. Therefore, it is incumbent upon the applicant to furnish the court with sufficient reason in support of such an application. What is sufficient reason? This naturally will vary from case to case. It is not possible for this court to provide an exhaustive list of what is considered to be sufficient reason. By way of illustration, in *Tio Chee Hing v Chung Khiaw Bank Ltd* [1981] 1 MLJ 227 the reasons given for the delay was that there were negotiations for settlement by arrangement. The High Court there accepted that as being sufficient reason and the Federal Court agreed with the trial judge. In *Public Bank Bhd v Seato Trading (M) Sdn Bhd & Ors* [1996] 1 MLJ 165, Zakaria Yatim J (as he then was) stated that 'it was proper for the plaintiff not to issue execution when the third defendant was making payments'. However, the fact that the application was made within the 12-year period as prescribed by s 6(3) of the Limitation Act 1953 for the bringing of an action upon a judgment is not a sufficient ground for granting of leave as the right to sue on a judgment is distinct from the right to issue execution.

In the present case, learned counsel for the appellant submitted that no injustice or prejudice would be caused to the respondent if leave is granted to the appellant. The learned judge had in his judgment considered this contention by the appellant. At p 4 of his judgment he stated:

> The calculation of the interest as worked out by the plaintiff in the affidavit was as at 12 July 1992 making a total sum due amounting to RM74,134.09. I then asked Ms Karen Wilfred for the plaintiff whether plaintiff had given any explanation as to why it had not proceeded to enforce, as of 1992. Since no explanation was stated in the affidavit no doubt counsel could not give any explanation from the Bar.

We agree with the learned judge that in an application under O 46 r 2 it is incumbent for the applicant to furnish sufficient reason to explain for their inaction. From the supporting affidavit the only reason put forth by the appellant in support of this application is the neglect of its former solicitors to initiate the necessary action. But again the appellant is also not free from blame. From the affidavit in support it would appear that the appellant took more than two years to appoint the new solicitors after appellant failed to hear from its former solicitors. Having considered the matter, we fully agree with the learned judge that the appellant failed to furnish sufficient reason to persuade the court to exercise the discretion in its favor.

For the above reasons we hold that the learned trial judge had properly exercised his discretion and we find there is no reason for this court to

A interfere with his discretion. The appeal is therefore dismissed and as the respondent was absent we made no order as to costs.

Appeal dismissed.

Reported by Andrew Christopher Simon

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